Supreme Court, U.S.
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No. _____ CLERK

In The

Supreme Court of the United States

JOHN R. LOUIS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the automatic imposition upon Petitioner of the addition to tax for fraud under former Internal Revenue Code ("IRC") § 6653(b), by operation of *res judicata* at the moment the jury returned a verdict of guilty in Petitioner's criminal tax fraud trial, is "punishment" for purposes of the Double Jeopardy Clause of the Fifth Amendment. This is an important question of federal law which this Court expressly left open for future consideration in *Helvering v. Mitchell*, 303 U.S. 391 (1938), and should now be decided by this Court.

Whether this Court should grant review of the Ninth Circuit's opinion below, which conflicts with this Court's opinions in *Austin v. United States*, 509 U.S. 602 (1993), and *United States v. Bajakajian*, 118 S.Ct. 2028 (1998) by failing to determine whether the addition to tax for fraud under former IRC § 6653(b) serves at least "in part" to punish and is therefore a "fine" cognizable under the Eighth Amendment's Excessive Fines Clause. Assuming the addition to tax is a fine, a further issue to be decided is whether the combined criminal monetary penalty imposed upon Petitioner and § 6653(b) addition to tax, both of which were finally determined in Petitioner's criminal trial and together exceeded the maximum fine allowed under IRC § 7201, was excessive.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, John R. Louis, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, of which review is sought, is reported at *Louis v. Commissioner of Internal Revenue*, 170 F.3d 1232 (9th Cir. 1999). A copy of the March 24, 1999 opinion is reproduced at Apdx A1.

The opinion of the United States Tax Court was filed on June 4, 1996, and is unofficially reported at *Louis v. Commissioner of Internal Revenue*, 71 TCM 3143 (1996). A copy of the opinion is reproduced at Apdx B1.

JURISDICTIONAL STATEMENT

On March 24, 1999, the Ninth Circuit Court of Appeals issued its opinion affirming the Tax Court's June 4, 1996 decision upholding Respondent's imposition of additions to tax for fraud under former IRC § 6653(b).[1] On May 17, 1999, Petitioner timely filed with the Ninth Circuit a Petition for Rehearing and Suggestion for Rehearing En Banc of its March 24, 1999 opinion. The

[1] Unless otherwise indicated, all statutory citations in this Petition are to the Internal Revenue Code (Title 26, U.S.C.).

Ninth Circuit denied Petitioner's petition for rehearing and rejected his suggestion for a rehearing en banc in an order filed June 25, 1999. Apdx C1.

The jurisdiction of this Court to review the judgment and opinion of the Ninth Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, U.S. Constitution

Eighth Amendment, U.S. Constitution

26 U.S.C. § 6653(b)[2]

26 U.S.C. § 7201

STATEMENT OF THE CASE

All of the facts set out herein were stipulated to in the Tax Court. On or about May 24, 1984, a grand jury sitting in the Eastern District of California indicted Petitioner John R. Louis ("Louis") on two felony counts of income tax evasion under § 7201 for the years 1977 and 1978. On or about September 5, 1984, Petitioner's jury trial commenced. The jury found Petitioner guilty on both counts of the indictment on or about September 13, 1984. The District Court for the Eastern District of California sentenced Petitioner to one year of incarceration on the

[2] Repealed by P.L. 101-239 § 7721(a) (1989).

first count (1977) and to three years of incarceration on the second count, and also fined Petitioner $5,000 for each count for a total of $10,000. The maximum fine allowed by statute for these years was $10,000 for each count for a total of $20,000. The three-year prison term for the second count was suspended on the condition that Petitioner serve five years of probation, file truthful and timely tax returns for the three years, and cooperate fully with any requests made by the Internal Revenue Service ("IRS"). Petitioner has satisfied his criminal sentence by payment of the fines, service of the one-year prison term, and successful completion of probation.

On December 23, 1991, the Respondent issued two statutory notices of deficiency to Petitioner, one for the tax years ending December 31, 1976 and December 31, 1977, and the other for the tax year ending December 31, 1978. The income tax deficiencies listed on those notices, as well as the penalties under former § 6653(b), are as follows: 1976 – deficiency of $1,448 and penalty of $724; 1977 – deficiency of $14,340 and penalty of $7,170; 1978 – deficiency of $74,609 and penalty of $37,305. The deficiency amounts asserted by the IRS in the statutory notices were identical to those asserted and used successfully to convict Petitioner of tax fraud.

On March 18, 1992, Petitioner filed two petitions in the United States Tax Court for redetermination of the deficiencies asserted by the IRS in each of its statutory notices. The Tax Court consolidated the two cases (Nos. 5942-92 and 5943-92) for trial, briefing, and opinion by order dated June 17, 1992. By stipulation of facts and issues, Petitioner agreed to the amounts of the income tax deficiencies for the years 1976, 1977, and 1978, but

reserved the right to contest imposition of the addition to tax for fraud under former § 6653(b) as violative of the Double Jeopardy Clause, the Excessive Fines Clause, and the criminal guarantees afforded by the Fifth and Sixth Amendments.

Petitioner subsequently propounded discovery in the consolidated Tax Court cases, seeking to show that the actual costs of investigating fraud in his case were zero. In response, Respondent agreed and the parties stipulated that the records showing the United States' costs of investigating and prosecuting Petitioner's criminal tax case were either no longer in existence or irretrievable, as the investigation had taken place 13 years earlier. Since the same figures were used both in the criminal case and to determine the § 6653(b) fraud penalty, however, it is a safe assumption that the government's investigative costs were zero.

On June 4, 1996, the Tax Court filed a Memorandum Opinion rejecting Petitioner's Constitutional arguments and upholding Respondent's additions to tax for fraud for the years 1976, 1977, and 1978. Decision documents were entered by the Tax Court on June 5, 1996. On July 2, 1996, Petitioner filed a motion to vacate the decisions based upon this Court's decisions in *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 116 S.Ct. 2106 (1996) and *United States v. Ursery*, 116 S.Ct. 2135 (1996). The Tax Court denied Petitioner's motion in an order dated July 3, 1996. On September 30, 1996, Petitioner filed timely notices of appeal to the Ninth Circuit Court of Appeals.

The Ninth Circuit affirmed the Tax Court, without oral argument, in an opinion filed March 24, 1999. On May 9, 1999, Petitioner timely filed with the Court a Petition for Rehearing and Suggestion for Rehearing En Banc of its March 24, 1999 opinion. The Court denied the petition for rehearing and rejected his suggestion for a rehearing en banc in an order filed June 25, 1999. Apdx C1.

REASONS FOR GRANTING THE WRIT

1. **The Double Jeopardy Analysis Employed in the Ninth Circuit's Decision Conflicts with This Court's Decisions in *United States v. Bajakajian* and *Department of Revenue of Montana v. Kurth Ranch*. The Decision also Raises an Important Question of Federal Law that was Left Undecided by This Court in *Helvering v. Mitchell* and Should Now be Settled by This Court: Namely, Whether the Automatic Imposition of the IRC's Addition to Tax for Fraud, at the Moment of Conviction for Criminal Tax Fraud By Operation of *Res Judicata* (Which Precludes Relitigation of the Fraud Penalty For the Same Tax Years), is "Punishment" Under the Double Jeopardy Clause.**

This Court recently held in *Hudson v. United States*, 522 U.S. 93 (1997), that the Double Jeopardy Clause applies only to sanctions that are criminal in nature. According to *Hudson*, determining whether a sanction is criminal or civil involves a two-step process. The first step is to determine whether Congress intended a given sanction to be civil or criminal in nature. If a sanction was intended by Congress to be civil in nature, then the

second step of analysis is to determine whether the sanction is so punitive in purpose or effect as to render it criminal despite Congress' intent to the contrary. 522 U.S. at 493 (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). The following factors are "useful guideposts" in determining whether the second step is satisfied:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment – retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears to be excessive in relation to the alternative purpose assigned."

Id. at 493 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)).

The Ninth Circuit below purported to apply both of the foregoing *Hudson* steps to former IRC § 6653(b), the sanction utilized by Respondent herein to impose upon Petitioner additions to tax for fraud. Citing this Court's decision in *Helvering v. Mitchell*, 303 U.S. 391 (1938), the Court concluded that Congress intended additions to tax for fraud to be a civil sanction. 170 F.3d at 1235. *Mitchell*, however, carefully excepted from its decision the instance in this case where a conviction for tax fraud simultaneously determines a taxpayer's tax liability and § 6653(b) addition to tax for fraud for the same tax years

so these matters cannot be contested in a subsequent civil proceeding. 303 U.S. at 397. Consequently, Petitioner does not believe that *Mitchell* can be applied here. The Court below ignored this crucial point.

In its application of the seven *Mendoza-Martinez* factors under the second step of the *Hudson* analysis, the Ninth Circuit's opinion relies heavily on *Mitchell* (which predated *Ward* and therefore did not apply the *Mendoza-Martinez* factors) for the proposition that the addition to tax for fraud serves a remedial purpose by reimbursing the government for "the heavy expense of investigation . . . resulting from the taxpayer's fraud." 303 U.S. at 401. The opinion's discussion of the *Mendoza-Martinez* factors comprises only four paragraphs. 170 F.3d at 1235. It is quite telling that in three of these paragraphs, the Court makes reference to the government's expenses of investigating fraud,[3] indicating this was the foremost consideration in its view.

This Court substantially undermined *Mitchell*, however, in footnote 19 of *United States v. Bajakajian*, 118 S.Ct. 2028, 2041 n.19 (1998). In footnote 19, this Court stated that the fact that a sanction "serves to reimburse the Government for investigation . . . expenses . . . is essentially meaningless" for purposes of determining whether the sanction serves remedial purposes. *Id.* This is because

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[3] One paragraph makes reference to the government's "heavy expense of investigation." The second discusses how fraud is "costly for the IRS to detect," and the third refers to the "expenses" suffered by the government due to fraud investigation.

even a clearly punitive sanction can be said "in some measure" to reimburse the government for its investigative costs. *Id.* In the present case, then, it was erroneous for the Court to repeatedly cite *Mitchell* for the proposition that investigative costs are relevant in determining whether the addition to tax for fraud is a criminal or civil sanction for Double Jeopardy purposes. Because this portion of the *Mitchell* holding has now been eliminated by *Bajakajian*, the Ninth Circuit's opinion conflicts with *Bajakajian* in a very important respect. Upon remand, it is incumbent upon the Ninth Circuit to re-apply the seven *Mendoza-Martinez* factors without regard to the government's expenses of investigating fraud. This is now a proscribed consideration under *Bajakajian*.

For instance, we would note that *Mitchell* may no longer be used to shield the fact that the addition to tax for fraud has historically been regarded as punishment under the second *Mendoza-Martinez* factor. Indeed, the predecessors to former IRC § 6653(b) have been regarded as punishment for hundreds of years under early American and English[4] common law. In the English House of Lords' decision in *Commissioner of Inland Revenue v. Hinchy*, [1960] All. E.R., the issue was whether a penalty equal to "treble the tax which [the taxpayer] ought to be charged" under the Income Tax Act of 1952 applied to the entire tax due for the year of assessment, or only to the

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[4] In England, the Inland Revenue's practice is to refrain from collecting civil money penalties on the basis of fraud in respect of an offense that has been before the criminal courts. This administrative practice is due to a recognition of the Double Jeopardy principle, which is deeply rooted in the English common law.

amount of the understatement attributable to fraudulent (or negligent, etc.) behavior. The House of Lords held that the 300% penalty applied to the entire tax due for the year of assessment. In reaching its decision, the House of Lords traced the history of the penalty provision back to the Tax Act of 1799:[5]

> Therefore, that we ought to search for a more rational meaning of the words of Section 25(3) than that which is offered by the interpretation supported by the Crown, I think that much depends upon what you regard as rational in this setting. Most of these penalty clauses have their origin in the Tax Acts of 1803-06, if not in the earlier year of 1799. Income Tax administration in those years was not the huge and efficient system to which we are now accustomed. If the purpose of Parliament at that time was, as I suspect, to impose heavy penalties for any kind of evasion, *primarily as a deterrent*, there is no reason for surprise that the various penalties are neither adjusted harmoniously to each other nor in themselves proportionate to degrees of blame or threatened losses of revenue. It was as rational to hit out blindly and heavily at anyone who was caught as to maintain *savage and indiscriminate punishments* under the criminal code until an effective police force had been established.

Hinchy, at 517-518 (emphasis added).

The American predecessors of IRC § 6653(b) were similarly regarded as punishment. Section 6653(b) has its

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[5] The Tax Act of 1799 reflected the prior law at the time the Bill of Rights was ratified.

origin in the income tax law enacted during the Civil War (§ 14 of the Revenue Act of 1864). In interpreting § 14 of the Revenue Act, this Court indicated that the purpose of the provision was to punish persons who attempted to defraud the government of revenue. *Dorsheimer v. United States*, 74 U.S. 166, 173 (1868). The government acted "*in terrorem* upon parties whose conscientious scruples [were] not sufficient to balance their hopes of profit." *Id.*

A number of American customs duties cases from the last century also demonstrate that the predecessors of § 6653(b) were regarded as punishment. *Helwig v. United States*, 188 U.S. 605, 610 (1903); *Bartlett v. Kane*, 16 How. 263, 274 (1853). With the exceptions of the Civil War period and the very end of the century, there was no income tax in the United States during the last century. Accordingly, the fraud penalty largely evolved in the customs duties context (a similar evolution took place in England).

Under the third *Mendoza-Martinez* factor, there is no question that the addition to tax for fraud under former IRC § 6653(b) only comes into play upon a finding of scienter. The very same scienter that was found to convict Petitioner for criminal tax fraud was also required for imposition of the § 6653(b) penalty. This stands in contrast to the monetary penalties at issue in *Hudson*, which were imposed by statute "without regard to the violator's state of mind." 118 S.Ct. at 496.

With respect to the fourth *Mendoza-Martinez* factor, Congress has admitted in legislative history that the *Mendoza-Martinez* factor promotes deterrence, which is one of the traditional aims of punishment (see discussion below

under the second Reason for Granting the Writ). The fifth factor is also satisfied, as the addition to tax was imposed upon Petitioner for behavior (i.e., tax fraud) that was already a crime under § 7201.

Finally, with regard to the sixth and seventh *Mendoza-Martinez* factors, no alternative remedial purpose is rationally connected to the § 6653(b) addition to tax for fraud imposed on Petitioner herein. As indicated above, the Ninth Circuit erroneously based most of its analysis under the *Mendoza-Martinez* factors on the *Mitchell* holding that the fraud penalty serves the remedial purpose of reimbursing the government for its investigative costs. This holding, however, has now been undermined by *Bajakajian*. 118 S.Ct. at 2041 n.19.

Even if the § 6653(b) penalty were regarded as serving a remedial purpose, however, it still would not in any way be rationally connected with such purpose. The fraud penalty has fluctuated tremendously since the enactment of the Sixteenth Amendment because the penalty has varied directly with the amount of the income tax deficiencies upon which it has been imposed. Such deficiencies, in turn, have been a direct function of the income tax rates. Because the tax rates have fluctuated dramatically this century, from 1% to 94%,[6] the amount of the fraud penalty has fluctuated in an equally dramatic fashion. This has not been due to any remedial purpose for the penalty, but has rather been attributable to the arbitrary whims of Congress in reacting to emergencies

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[6] *See 11 Thurgood Marshall Law Review* 349, 356-359 (1986).

(e.g., two World Wars, the Korean War, and the Vietnam War) as well as other events.

In addition to conflicting with *Bajakajian*, the Ninth Circuit's opinion also conflicts with this Court's decision in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994), which held that a punitive tax imposed on the same forbidden criminal conduct for which punishment had already been imposed violated the Double Jeopardy Clause. Here, Petitioner was subjected to criminal penalties upon his conviction for tax fraud. At the moment of his conviction, Petitioner was also subjected automatically to additions to tax for fraud under § 6653(b) because the criminal figures determined both Petitioner's tax liability as well as the amount of the additions to tax for the same years. The additions to tax arose out of Petitioners' criminal conviction and could not be contested in any civil tax redetermination or refund proceeding due to *res judicata*.[7] The doctrine of *res judicata* barred Petitioner from relitigating the 1977 and 1978 tax years, each of which was a separate cause of action. *Sunnen v. Commissioner*, 333 U.S. 591, 598-599 (1948). In this respect, the instant case differs from *Hudson*, where *res judicata* was not a bar to litigation in the subsequent proceeding. Moreover, *Hudson* involved punishment arising from two different Titles of the United States Code (Titles 12 and 18). Here, in contrast, Petitioner's tax fraud conviction automatically subjected him

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[7] *See Tomlinson v. Lefkowitz*, 334 F.2d 262, 266 (5th Cir. 1964); *Amos v. Commissioner*, 360 F.2d 358, 359 (4th Cir. 1965); *Moore v. United States*, 360 F.2d 353, 357 (4th Cir. 1965); *Armstrong v. United States*, 354 F.2d 274, 291 (Ct.Cl. 1965).

to penalties under two Title 26 provisions – § 6653(b) and § 7201.

Section 6653(b)'s label as an "addition to tax" cannot be used to escape the conclusion that it effectively constitutes a second criminal punishment for Petitioner's tax fraud. This Court has long recognized that where a person is convicted of a crime and the same sovereign then uses a different statutory provision to impose a second penalty on the same forbidden conduct, the second penalty is barred by the Double Jeopardy Clause. *United States v. La Franca*, 282 U.S. 569, 572-575 (1931); *United States v. Choteau*, 102 U.S. 603 (1880). As recently as 1996, this Court relied upon *La Franca* to support the conclusion that a flat percentage "tax" under the IRC was punitive. *Reorganized CF & I Fabricators of Utah*, 116 S.Ct. at 2113. *La Franca* was also relied upon by this Court in its *Kurth Ranch* decision. 114 S.Ct. at 1947.

The Ninth Circuit's opinion erroneously fails to recognize that this Court in *Mitchell* strictly limited its holding to the situation where the taxpayer is acquitted of criminal tax fraud.[8] 303 U.S. at 395, 397-398. Where there has been a prior acquittal, *res judicata* does not bar the government from seeking to impose fraud penalties in any subsequent civil tax redetermination proceeding due to the government's higher burden of proof in the criminal proceeding.

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[8] No other Circuit has yet to confront this issue squarely. The opinions from the other Circuits invariably gloss over the issue by citing *Mitchell* broadly.

2. The Ninth Circuit's Decision Conflicts with This Court's Decisions in *Bajakajian* and *Austin*. The Opinion Fails to Apply the Comprehensive Analysis Required by These Cases in Determining Whether the IRC's Addition to Tax For Fraud, As Applied to Petitioner Herein, Constitutes "Punishment" Cognizable Under the Eighth Amendment's Excessive Fines Clause. Moreover, the Opinion Misapprehends that This Constitutional Inquiry is Altogether Separate From the Issue of Double Jeopardy.

A "fine" for purposes of the Eighth Amendment's Excessive Fines Clause means any payment to a sovereign as punishment for some offense. *United States v. Bajakajian*, 118 S.Ct. 2028, 2033 (1998). Since Petitioner's tax fraud conviction automatically resulted in the imposition of the § 6653(b) penalty, the penalty is a fine. The fine is excessive because it exceeds the statutory maximum allowed under § 7201. *United States v. Libretti*, 38 F.3d 523, 531 (10th Cir. 1994).

In determining whether a given payment to a sovereign constitutes punishment, the payment's categorization as civil or criminal is not controlling. *Austin v. United States*, 509 U.S. 602, 610 (1993). All that is required is that the payment "was understood at least *in part* as punishment" at the time the Eighth Amendment was ratified. *Id.* (Emphasis added.) As long as a payment to a sovereign "can only be explained as serving *in part* to punish," it falls within the purview of the Excessive Fines Clause. *Id.* It is of no consequence that the payment also serves remedial purposes. *Id.* (Emphasis added.)

In its Excessive Fines Clause analysis of the addition to tax for fraud, the Ninth Circuit has improperly failed

to apply the foregoing "in part" test required under *Austin* and followed by this Court in *Bajakajian*. 118 S.Ct. at 2034 n.4. In its place, the Court has effectively substituted an "all or nothing test," under which a payment to a sovereign is categorized as either punitive in its entirety or remedial in its entirety depending on its "primary purpose." Based in substantial part on its assertion that the "*purposes* of additions to tax for fraud are *primarily remedial*"[9] (emphasis added), the Court concludes such additions are not punishment subject to review under the Excessive Fines Clause:

> We therefore conclude that the additions to tax for fraud are "properly . . . characterized as remedial," *Austin*, 509 U.S. at 608 n.4, and as such, are not subject to review under the Excessive Fines Clause.

The Court's reliance on footnote 4 of *Austin* is inappropriate under the Excessive Fines Clause. The portion of footnote 4 quoted by the Court pertains solely to the Double Jeopardy Clause:

> The Double Jeopardy Clause has been held not to apply in civil forfeiture proceedings, but only in cases where the forfeiture could *properly be characterized as remedial.*

509 U.S. at 608 n. 4. (Emphasis added; citations omitted.)

By focusing its analysis on whether the addition to tax for fraud can "properly be characterized as remedial" for Double Jeopardy purposes, the Court has missed the

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[9] *The Court relies on Mitchell*, 303 U.S. at 401, for this proposition.

relevant constitutional inquiry under the Excessive Fines Clause and *Austin*. The relevant constitutional inquiry is whether the addition to tax for fraud can "only be explained as serving in part to punish." 509 U.S. at 610. This is not an "all or nothing" inquiry as the Court's opinion suggests. As this Court stated in *Austin*:

> Thus, the question is not, as the United States would have it, whether forfeiture under [21 U.S.C.] §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment. In considering this question, we are mindful of the fact that *sanctions frequently serve more than one purpose*. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, *must determine that it can only be explained as serving in part to punish.*

Id. (Emphasis added.)

Even if it were true in the present case, as the Ninth Circuit's opinion asserts, that "the purposes of additions to tax for fraud are primarily remedial," this would still amount to an implicit acknowledgement that the additions serve at least "in part" to punish. Accordingly, under *Austin* the additions would fall within the purview of the Excessive Fines Clause.

The emphasis placed in the opinion on whether the purposes of additions to tax for fraud are "primarily remedial" indicates that the Court has misapprehended and confused the following two distinct constitutional inquiries: (1) Whether an intended civil sanction is "so punitive either in purpose or effect" as to transform the

sanction into a criminal penalty for purposes of the Double Jeopardy Clause;[10] and (2) Whether a payment to a sovereign serves in part to punish under the Excessive Fines Clause.

While the issue of whether additions to tax for fraud are "primarily remedial" may be germane to the former constitutional inquiry under the Double Jeopardy Clause, it is not dispositive of the latter constitutional inquiry under the Excessive Fines Clause. We reiterate that even if the purposes of the additions to tax for fraud were "primarily remedial," this would nonetheless imply that they also serve "in part" to punish and hence fall within the purview of the Eighth Amendment.

The crucial mistake in the Ninth Circuit's Excessive Fines Clause analysis, then, is the incorporation therein of its Double Jeopardy analysis. The opinion states:

> Furthermore, *as we noted in Part II,* the purposes of additions to tax for fraud are primarily remedial: to protect the revenue and to reimburse the government for the expense of investigating fraud.

170 F.3d at 1236 (Emphasis added.)

The referenced portion of Part II the opinion is where the Court applied the *Mendoza-Martinez* factors in arriving at its conclusion that the additions to tax for fraud are not criminal sanctions for Double Jeopardy purposes. As

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[10] *Ward,* 448 U.S. at 248-249 (1980); *Mendoza-Martinez,* 372 U.S. at 168-169.

this Court has made clear in *Austin*, however, this conclusion does not automatically establish that the additions are not punitive under the Eighth Amendment:

> [The United States] further suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is *so punitive that it must be considered criminal* under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), and *United States v. Ward*, 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). Brief for United States 26-27. *We disagree.*

509 U.S. at 607. (Emphasis added.)

This Court in *Hudson* (fn. 1), while disavowing in large part its Double Jeopardy analysis set out in *United States v. Halper*, 490 U.S. 435 (1989), reaffirmed that the Excessive Fines Clause affords much broader constitutional protection than does the Double Jeopardy Clause in that it applies both to civil and criminal fines:

> Finally, it should be noted that some of the ills at which *Halper* was directed are addressed by other constitutional provisions . . . *The Eighth Amendment protects against excessive civil fines, including forfeitures. Alexander v. United States*, 509 U.S. 544 (1993); *Austin v. United States*, 509 U.S. 602 (1993). The additional protection afforded by extending double jeopardy protections to proceedings heretofore thought to be civil is more than offset by the confusion created by attempting to distinguish between "punitive" and "nonpunitive" penalties.

Thus, while the distinction between "punitive" and "nonpunitive" civil penalties may no longer have relevance under the Double Jeopardy Clause, the distinction

between "punitive" and "nonpunitive" payments to a sovereign continues to be dispositive under the Excessive Fines Clause. Under *Austin*, a "punitive" payment is broadly defined as any payment to a sovereign so long as it serves *in part* as punishment. 509 U.S. at 610; *Bajakajian*, 118 S.Ct. at 2034 n.4. Conversely, a payment to a sovereign can only be characterized as "nonpunitive" if it can fairly be said *solely* to serve a remedial purpose. *Austin*, 509 U.S. at 621.

Here, the Ninth Circuit's opinion characterizes the addition to tax for fraud as nonpunitive based in substantial part on its assertion that the purposes of the addition are "primarily remedial" rather than "solely remedial" as required under *Austin* and *Bajakajian*. Accordingly, the opinion conflicts with these two decisions from this Court.

In determining whether a payment serves "in part" to punish, and is hence subject to review under the Excessive Fines Clause, a court must initially determine "whether, at the time the Eighth Amendment was ratified, [the particular type of payment] was understood at least in part as punishment." *Austin*, 509 U.S. at 610. After this initial determination is made, the court must next determine whether the current statutory provision imposing the payment "should be so understood today" in light of its historical understanding. *Id.* In making the latter determination, the court should consider the statute's language and legislative history, as well as the circumstances of the payment's imposition. *Id.* at 619-622; *Bajakajian*, 118 S.Ct. at 2033-2035.

In determining whether a payment to a sovereign was understood in part as punishment at the time the Eighth Amendment was ratified, this Court instructs courts to look to the English Common law. *Austin*, 509 U.S. at 611-613; *Bajakajian*, 118 S.Ct. at 2034-2036. *See also Grandfinanciera SA v. Nordberg*, 109 S.Ct. 2782, 2790 (1989) [English common law looked to in determining meaning of Constitutional right to a jury trial]; *Wilson v. Arkansas*, 115 S.Ct. 1914, 1916 (1995) [English common law relied upon in interpreting the Fourth Amendment].

As discussed above (see discussion under the first Reason for Granting the Writ), the English common law regarded flat percentage penalties of tax as punitive. The *Hinchy* case leaves no room to question that the predecessors to § 6653(b) were regarded as punishment, *at least in part*, at the time the Eighth Amendment was ratified. This is all that *Austin* and *Bajakajian* require. The statement in the Court's opinion that "Louis has not shown that § 6653(b)'s many predecessors were considered *punitive rather than remedial*," 170 F.3d at 1236 (emphasis added), therefore misses the relevant constitutional inquiry. The issue is not whether § 6653(b)'s predecessors were historically regarded as falling either entirely into the "punitive" category or entirely into the "remedial" category. Because the Court's opinion fails to recognize as much, it conflicts with *Austin* and *Bajakajian*.

The Court's opinion fails to mention legislative history cited by Petitioner below indicating that the addition to tax for fraud was designed, at least in part, to serve punitive purposes. The legislative history is replete with references to the addition to tax for fraud as the "fraud

penalty,"[11] and the term "penalty" involves the idea of punishment – whether or not inflicted by criminal prosecution. *United States v. La Franca*, 282 U.S. 568, 573-574 (1931), quoting *United States v. Choteau*, 102 U.S. 603, 611 (1881).

Further, when Congress narrowed the addition to tax for fraud in the Revenue Act of 1986 to apply only to the portion of an understatement attributable to fraud, it noted:

> The committee is concerned that imposing the same penalty on two taxpayers who have identical underpayments, one attributable wholly to fraud and the other attributable only in part to fraud, may be an *insufficient deterrent* to fraudulent behavior.

(Emphasis added.)

This Court has stated in *Halper* that "punishment serves the twin aims of retribution and deterrence." 409 U.S. at 439. Because the above-quoted legislative history indicates that the addition to tax for fraud serves the aim of deterrence, "it can only be explained as serving in part to punish." *Austin*, 509 U.S. at 610; *Bajakajian*, 118 S.Ct. 2034 n.4. Moreover, it cannot be considered "solely" remedial. *Austin*, 509 U.S. at 621. Accordingly, the inquiry ends here, and the addition to tax for fraud falls within the purview of the Eighth Amendment.

The Ninth Circuit's opinion correctly notes that § 6653(b)(3)'s "innocent spouse exception" evidences a punitive intent. 170 F.3d at 1236. The opinion fails to

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[11] *See* S.Rep. No. 445, 100th Cong., 2d Sess.

draw the necessary conclusion from this, however, that the addition to tax fraud "can only be explained as serving in part to punish." *Austin*, 509 U.S. at 610; *Bajakajian*, 118 S.Ct. at 2034 n.4.

While the opinion also correctly points out that the addition to tax for fraud may be imposed "regardless of whether the taxpayer has been convicted of a felony," 170 F.3d at 1236, this ignores the fact that taxpayers such as Petitioner, who have been convicted of tax fraud, may not contest the penalty's imposition due to the operation of *res judicata* (*see* the first Reason for Granting the Writ, above). Here, the penalty was automatically determined in Petitioner's criminal case, and Petitioner was precluded from relitigating the 1977 and 1978 tax year causes of action. *Sunnen*, 333 U.S. at 598-599. When there has been a prior conviction, the punitive character of the addition to tax for fraud is heightened.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN R. LOUIS, *Petitioner-Appellant,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellee.*	No. 96-70808 Tax Court No. 5942-92 **OPINION**

Appeal from a Decision of the
United States Tax Court

Submitted March 9, 1999*
San Francisco, California

Filed March 24, 1999

Before: James R. Browning, Harry Pregerson, and Michael Daly Hawkins, Circuit Judges.

Per Curiam Opinion

COUNSEL

Edward O.C. Ord and Christian M. Winther, Ord & Norman, San Francisco, California, for the petitioner-appellant.

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* The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a)(2).

Theodore M. Doolittle, United States Department of Justice, Washington, D.C., for the respondent-appellee.

OPINION

PER CURIAM:

After conviction and punishment for tax fraud during the years 1977 and 1978, John R. Louis ("Louis") challenges the IRS's imposition under 26 U.S.C. § 6653(b) of additions to tax for fraud for the years 1976, 1977 and 1978 as violative of: (1) the Double Jeopardy Clause; (2) the Eighth Amendment; and (3) the Fifth and Sixth Amendments. We review the tax court's rejection of Louis's challenges de novo and affirm.

I.

This court recently held additions to tax for fraud to be a civil remedy, not a criminal punishment, and therefore beyond the scope of the Double Jeopardy Clause, which prohibits only multiple *criminal* punishments for the same offense. *See I & O Publishing Co., Inc. v. Commissioner of Internal Revenue Serv.*, 131 F.3d 1314, 1316 (9th Cir. 1997). Shortly before *I & O Publishing* was filed, the Supreme Court decided *Hudson v. United States*, 118 S. Ct. 488 (1997), which considered the nature of monetary penalties imposed on bank officers previously convicted of misapplying bank funds. *Hudson* laid out a two-step analysis to determine whether a penalty is civil or criminal. *See id.* at 493. Apparently *Hudson* was not called to the attention of the *I & O Publishing* panel, which concluded that additions to tax for fraud are not punishment but did

not explicitly employ the two-step *Hudson* test. We now apply that test and affirm.[1]

According to *Hudson*, determining whether a particular punishment is criminal or civil involves a two-step process: (1) statutory construction to determine whether Congress indicated an express or implied preference for one label or the other; and if Congress intended to establish a civil penalty, (2) an evaluation of " 'whether the statutory scheme [is] so punitive either in purpose or effect' " as to transform the intended civil sanction into a criminal penalty. *Id.* at 493 (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). The following factors are "useful guideposts" in determining whether the second step is satisfied:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation

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[1] We reject Louis' argument that *I & O Publishing and Helvering v. Mitchell*, 303 U.S. 391 (1938), on which *I & O Publishing* relied, are no longer good law after *Hudson*. The Supreme Court gave no indication in *Hudson* that it intended to disavow *Mitchell*. To the contrary, the Court repeatedly cited *Mitchell* approvingly. *See Hudson*, 118 S. Ct. at 493, 495 & 496. Although the opinions in *Mitchell* and *I & O Publishing* focused only on the first step of the *Hudson* test (Congressional intent), rendering them somewhat incomplete, they are not wholly superseded, as Louis alleges. The conclusion in *Mitchell* and *I & O Publishing* that additions to tax for fraud are remedial in nature, not criminal, strongly indicates that there is no "clear proof" that the statutory scheme is "so punitive" as to be criminal.

> will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Id. at 493 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). These factors are to be considered in relation to the "statute on its face," and "only the clearest proof" will suffice to override legislative intent that a remedy be civil in nature. *Id.* at 493 (citing *Ward*, 448 U.S. at 249).

A.

There is no double jeopardy problem with the addition to tax for fraud imposed for 1976, since Louis was not criminally prosecuted for that year. Turning to 1977 and 1978, it is clear Congress intended additions to tax for fraud to be "a civil, not a criminal, sanction." *Mitchell*, 303 U.S. at 402. *Mitchell's* conclusion that Congress intended additions to tax for fraud to be a civil sanction is not limited to cases in which the taxpayer has previously been acquitted, rather than convicted, of criminal tax fraud. *See Mitchell*, 303 U.S. at 401-05.

B.

Considering the "guidepost" factors laid out in *Hudson*, Louis has produced little evidence, much less the "clearest proof," that the additions to tax for fraud

imposed in his case are so punitive as to overcome clear congressional intent that they be civil rather than criminal in nature. Additions to tax for fraud do not amount to an affirmative disability or restraint, nor have they historically been regarded as punishment. *See Hudson*, 118 S.Ct. at 496. Their purpose is remedial; they "are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." *Mitchell*, 303 U.S. at 401; *see also I & O Publishing*, 131 F.3d at 1316. Even if deterrence is an additional purpose for the additions, the Supreme Court has recognized that monetary penalties may deter others without being criminal in nature. *See Hudson*, 118 S. Ct. at 496 ("[T]he mere presence of this purpose is insufficient to render a sanction criminal.").

Several of the guidepost factors are present to some degree, but they are insufficient to render the additions to tax criminal. Although it is certainly true that fraud, and therefore fraudulent intent, are prerequisites to the imposition of an addition to tax for fraud, punishing fraudulent intent is not the central focus of these additions to tax. The fraud requirement is designed to ensure that the additions are imposed only on taxpayers who engage in the type of deceptive behavior that is difficult and costly for the IRS to detect. *See Mitchell*, 303 U.S. at 401; *see also United States v. Alt*, 83 F.3d 779, 782-83 (6th Cir. 1996) ("fraudulent filings are more difficult to catch than merely negligent ones"). To the extent this factor may favor a finding that the addition to tax is punitive, it does so only to a very limited degree.

It is clear that Congress intended tax fraud to be subject to both criminal sanctions and additions to tax for fraud. This factor alone, however, "is insufficient to render the money penalties . . . criminally punitive." *Hudson*, 118 S.Ct. at 496. Congress may impose both civil and criminal penalties in connection with the same proscribed behavior without violating the Double Jeopardy Clause. *See id.* at 493, 496.

Finally, while it is true that the magnitude of the addition will fluctuate somewhat over time as tax rates rise and fall, the addition achieves "rough justice" and is not "so divorced from the reality of what the government suffered in damages and expenses as to constitute punishment." *United States v. Morgan*, 51 F.3d 1105, 1115 (2d Cir. 1995) (citing *United States v. Halper*, 490 U.S. 435, 449 (1989) (overruled in part on other grounds by *Hudson*, 118 S.Ct. at 494-95)); *see also Alt*, 83 F.3d at 782.[2] Moreover,

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[2] Louis argues that under *United States v. United States Shoe Corp.*, 118 S.Ct. 1290 (1998), charges assessed on an ad valorem basis can never be a valid method of reimbursing the government for its expenses. *United States Shoe Corp.* analyzed a "Harbor Maintenance Tax" (HMT) under the Exports Clause, which prohibits federal taxation of exports, but allows the government to charge user fees "as compensation for government-supplied services." *Id.* at 1292. The Court concluded that the HMT, an ad valorem assessment based on the amount of cargo a ship is carrying, did not "correlate reliably with the federal harbor services used," and was therefore a tax rather than a user fee. *Id.* at 1295.

Louis relies on this language to argue that because additions to tax for fraud are an ad valorem assessment based on the amount of the underpayment of taxes, they do not "correlate reliably" with the government's costs. However, *United States Shoe Corp.*'s analysis was limited to the context of

even if we agreed with Louis that this final guidepost factor may suggest the additions to tax for fraud were punitive, it would be improper to elevate this factor to dispositive status, as the Court did in *Halper*. *See Hudson*, 118 S.Ct. at 494.

II.

The Excessive Fines Clause of the Eighth Amendment prohibits the government from imposing excessive fines as punishment. U.S. Const. amend. VIII. Even a civil sanction may be punitive for Eighth Amendment purposes. *See Austin v. United States*, 509 U.S. 602, 610 (1993). A civil sanction is punitive if "it can only be explained as serving in part to punish." *Id.*; *see also United States v. Bajakajian*, 118 S.Ct. 2028, 2034 n.4 (1998). In making this determination, the court considers factors such as the language of the statute creating the sanction, the sanction's purpose(s), the circumstances in which the sanction can be imposed, and the historical understanding of the sanction. *See Bajakajian*, 118 S.Ct. at 2033-35.

Although § 6653(b)(3) provides an "innocent spouse exception" similar to the "innocent owner defense" of the forfeiture statute considered punitive in *Austin*, 509 U.S. at 619, the statutory language provides no other indication of punitive intent. Furthermore, as we noted in Part

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the Exports Clause. The Court noted that in other contexts, it has upheld ad valorem charges as a valid method of reimbursing the government. *See id.* at 1294-95. Contrary to Louis' argument, *United States Shoe Corp.* does not hold that ad valorem assessments are never sufficiently related to the government's costs to serve a remedial purpose.

II, the purposes of additions to tax for fraud are primarily remedial: to protect the revenue and to reimburse the government for the expense of investigating fraud. Moreover, unlike the forfeiture at issue in *Bajakajian*, additions to tax for fraud can be imposed regardless of whether the taxpayer has been convicted of a felony, and are not imposed as part of a criminal sentence. *See Mitchell*, 303 U.S. at 406 (taxpayer liable for additions to tax for fraud even though he was acquitted of the criminal charges).

The eighteenth-century predecessors to § 6653(b) which Louis cites do not support his argument that additions to tax for fraud have historically been understood as punitive. The statutes merely provide that a person who did not pay his taxes was subject to a fine equal to a stipulated percentage of the underpayment. Louis has not shown that § 6653(b)'s many predecessors were considered punitive rather than remedial.

We therefore conclude that additions to tax for fraud are "properly . . . characterized as remedial," *Austin*, 509 U.S. at 608 n.4, and as such, are not subject to review under the Excessive Fines Clause. *Cf. Little v. Commissioner*, 106 F.3d 1445, 1454 (9th Cir. 1997) (finding that additions to tax for negligence under 26 U.S.C. § 6653(a) are remedial for purposes of the Excessive Fines Clause).

III.

Louis' argument that the Fifth and Sixth Amendments were violated by the administrative assessment of additions to tax for fraud fails for the same reason as his

Double Jeopardy challenge – the additions are civil, not criminal, in nature.

AFFIRMED.

[CCH Dec. 51,378(M)] John R. Louis v. Commissioner.

Docket Nos. 5942-92, 5943-92. T.C. Memo. 1996-257. Filed June 4, 1996. [appealable, barring stipulation to the contrary, to CA-9. – CCH.]

[*Code Sec. 6653, prior to amendment by P.L. 101-239*]

Penalties, civil: Fraud: Criminal conviction: Tax evasion: Double Jeopardy Clause: Excessive Fines Clause. – The assessment of additions to tax for fraud, against an individual who had been criminally convicted of tax evasion did not violate his Fifth or Eighth Amendment rights. The imposition of tax penalties was considered compensatory rather than punitive in nature because they compensated the government for lost revenues and for costs incurred in investigating the taxpayer's fraud. Consequently, holding the taxpayer liable for the additions to tax did not subject him to double jeopardy or result in excessive fines. – CCH.

Edward O.C. Ord, San Francisco, Calif., for the petitioner. David W. Sorensen, for the respondent.

MEMORANDUM OPINION

RAUM, Judge: The Commissioner determined deficiencies in petitioner's income taxes and additions to tax for fraud as follows:

Docket No. 5943-92

Year	*Deficiency*	*Addition to Tax Sec. 6653(b)*
1976	$ 1,448	$ 724
1977	14,340	7,170

Docket No. 5942-92

Year	*Deficiency*	*Addition to Tax Sec. 6653(b)*
1978	$74,609	$37,305

Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years at issue, and all Rule references are in the Tax Court Rules of Practice and Procedure.

After stipulations by the parties, the remaining issue for decision is whether additions to tax for fraud under section 6653(b) violate the Double Jeopardy and Excessive Fines Clauses of the Fifth and Eighth Amendments where petitioner has been criminally convicted of tax evasion under section 7201 and has served jail time and paid fines pursuant to those convictions.

Petitioner, John R. Louis was resident of Modesto, California, at the time the petition in this case was filed. He was the subject of an investigation by a grand jury, based on information developed by the Criminal Investigation Division of the IRS.

On or about May 24, 1984, petitioner was indicated on two counts under section 7201[1] for the taxable years 1977 and 1978. After a jury trial of approximately a week, the jury reached a verdict of guilty on all counts. Petitioner was sentenced to 1 year in jail on Count 1 and 3 years on Count II, with the 3-year term on Count II suspended on condition that petitioner serve 5 years of probation, file truthful, timely tax returns, and cooperate fully with any requests made by the IRS. He was also fined $5,000 on each count. Petitioner has satisfied the sentence by payment of both fines in full, as well as serving the jail sentence and satisfactorily completing the probationary period.

The figures of omitted gross income and alleged unreported income tax liabilities that were developed and charged in the criminal prosecution indictment were also used in the statutory notices of deficiency that were issued for the taxable years 1976, 1977, and 1978. The IRS acknowledges that, to the extent that the investigation in this case occurred approximately 13 years ago, the records to show how much money the United States spent to investigate and prosecute the petitioner's case are no longer in existence or are unretreivable.

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[1] Section 7201 provided:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Petitioner does not contest his liability for the 1976, 1977, and 1978 deficiencies. Nor does he contest his liability for the section 6653(b) additions to tax for fraud for those years on the merits. He instead contends that the section 6653(b) additions to tax violate the double jeopardy provisions of the Fifth Amendment and the excessive fines provisions of the Eighth Amendment.[2]

Section 6653(b) provides that "If any part of the underpayment * * * of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment"[3] The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

In *Helvering v. Mitchell* [38-1 USTC ¶ 9152], 303 U.S. 391 (1938), the Supreme Court in an income tax case held that civil fraud penalties are remedial in nature when

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[2] As to 1976, decision will necessarily have to be entered for respondent regardless of the other 2 years, since the Fifth and Eighty Amendment arguments apply only to the sanctions imposed in the prosecutions, which related solely to 1977 and 1978. See *Miller v. Commissioner* [Dec. 49,881(M)], T.C. Memo. 1994-249 (to trigger double jeopardy analysis conduct must be subject of civil and criminal punishment).

[3] The revised fraud addition to tax now appears in secs. 6663 and 6651(f). Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, secs. 7721(a), 7741(a), 103 Stat. 2106, 2395, 2404. Current sec. 6663(a) states that "If any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud."

imposed upon a taxpayer who has been tried, but not convicted of criminal tax evasion. The Supreme Court subsequently held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as deterrent or retribution." *United States v. Halper*, 490 U.S. 435, 448-449 (1989). However, *Halper* involved medicare fraud under the Civil False Claims Act, and the First Circuit has made clear that "To use *Halper* as a base for vaulting into the tax arena would be to misapply the case and distort its holding." *McNichols v. Commissioner* [94-1 USTC ¶ 50,003], 13 F.3d 432, 435 (1st Cir. 1993), affg. [Dec. 48,870(M)] T.C. Memo, 1993-61. And this Court has held that the imposition of section 6653(b) fraud additions after a taxpayer has been criminally convicted pursuant to section 7201 does not violate the Double Jeopardy Clause. *Ianniello v. Commissioner* [Dec. 48,019], 98 T.C. 163, 183-185 (1992) ("The additions to tax for fraud are a stated percentage of the dollar amount of the tax deficiencies, and are therefore tailored to the severity of the violation. * * * Thus, unlike *United States v. Halper, supra*, the additions imposed against petitioners are rationally related to the governmental costs incurred by reason of their fraudulent underpayments of tax."); *Barnette v. Commissioner* [Dec. 46,883], 95 T.C. 341, 347-348 (1990).

Petitioner relies heavily upon the Supreme Court's recent opinion in *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S. Ct. 1937 (1994), a case that does not involve federal income taxes, but is concerned with a Montana forfeiture provision relating to

dangerous drugs. Petitioner argues that *Kurth Ranch* has called into question the conclusion reached in *Mitchell* and the cases following it. Petitioner contends, relying upon *Kurth Ranch,* that since he has already been convicted under section 7201, paid $10,000 in fines, and served 1 year in jail and 5 years on probation, imposition of the section 6653(b) additions to tax for the years at issue would violate the Double Jeopardy Clause. However, *Kurth Ranch* did not overrule *Mitchell,* and until the Supreme Court does so, we must treat Mr. Justice Brandeis' opinion in *Mitchell* as the law of the land, notwithstanding petitioner's unfair characterization of *Mitchell* as "superannuated".

The purported applicability of *Kurth Ranch* to the section 6653(b) additions to tax has already been considered by this Court. In *Ward v. Commissioner* [Dec. 50,721(M)], T.C. Memo. 1995-286, it was held that *Kurth Ranch* did not change the status of the addition for fraud as remedial. "Thus, the imposition of a civil fraud penalty following the criminal conviction does not violate the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution." *Ward v. Commissioner, supra* (citing *Ianniello v. Commissioner* [Dec. 48,019], 98 T.C. 165 (1992)). *Kurth Ranch* was also distinguished very recently in *Price v. Commissioner* [Dec. 51,318(M)], T.C. Memo. 1996-204, where this Court pointed out that the addition for civil fraud "was imposed primarily to protect the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud. *Helvering v. Mitchell* [38-1 USTC ¶ 9152], 303 U.S. 391, 398, 401 (1938); *Ianniello v. Commissioner,* [Dec. 48,019], 98 T.C. 163, 176-185 (1992)."

Finally, two Courts of Appeals have even more recently rejected the contention that the so called civil fraud penalty brings into play the double jeopardy provisions. In *Grimes v. Commissioner* [96-1 USTC ¶ 50,220], ___ F.3d ___, ___ (9th Cir. Apr. 17, 1996), the Ninth Circuit stated:

> Grimes argues that the imposition of fraud penalties renders the proceeding quasi-criminal. Two recent Supreme Court cases addressing the definition of "punishment" for the purposes of the Double Jeopardy Clause give this argument a superficial appeal. See *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994) (finding that a Montana state tax on marijuana constitutes punishment); *United States v. Halper*, 490 U.S. 435 (1989) (the "civil" label does not determine whether a sanction is punishment).
>
> Both of these decisions, however, cite with approval *Helvering v. Mitchell* [38-1 USTC ¶ 9152], U.S. 391 (1938), where the Court found the Tax Code's civil fraud penalty remedial in nature and not punitive for double jeopardy purposes. See *Kurth Ranch*, 114 S. Ct. at 1946 n. 16; *Halper*, 490 U.S. at 442-43. [Fn. ref. omitted.]

Shortly thereafter, the Sixth Circuit in *United States v. Alt* [96-1 USTC ¶ 50,267], ___ F.3d ___ (6th Cir. May 15, 1996), explicitly recognized the continuing vitality of *Helvering v. Mitchell, supra*. The Sixth Circuit held that the award of tax penalties was not "punishment," explaining at ___, that they are merely compensatory for lost tax revenue and that they are higher than the penalties for negligence because "actively fraudulent filings are more difficult to catch than merely negligent ones."

We hold that additions to tax as applied to the petitioner do not result in double jeopardy.

We next turn to petitioner's Eighth Amendment argument. The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Petitioner contends that imposition of the additions to tax on top of his previous fines, prison sentence, and probation violates the Eighth Amendment prohibition of excessive fines. The taxpayers in *Ianniello* also asserted that their Eight Amendment rights would be violated if they had to pay the additions to tax for fraud on top of their criminal fines and prison sentences. *Ianniello v. Commissioner, supra.* The Court held otherwise. "We already have held that petitioners' liability for Federal income tax deficiencies and additions to tax for fraud compensates the United States for lost revenues and costs incurred in investigating petitioners' fraud. Accordingly, the Eighth Amendment does not apply to petitioners' liability for the Federal income tax deficiencies and the additions to tax for fraud imposed against petitioners under section 6653(b)." *Id.* at 187. The same reasoning applies here. Indeed, the Sixth Circuit's opinion in *Alt* disposed of the Eighth Amendment point summarily, stating at [96-1 USTC ¶ 50,267] ___ F.3d ___, ___:

> Because we hold that the tax penalties awarded against Alt are not "punishment," there is no need to address Alt's claim that the penalties constitute an excessive fine under the Eight Amendment. Like the Double Jeopardy Clause, the Excessive Fines Clause only protects against "punishment." * * * [citations omitted]

We hold that the petitioner's Eighth Amendment argument adds nothing to his case.

Decisions will be entered for respondent.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN R. LOUIS, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	No. 96-70808 Tax Court No. 5942-92 ORDER (Filed Jun. 25, 1999)

Before: BROWNING, PREGERSON, and HAWKINS, Circuit Judges

The petition for rehearing en banc is denied.

U.S. Const.

AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const.

AMENDMENT VIII – EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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26 U.S.C. § 6653. Failure to pay tax

* * *

(b) Fraud. – If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a). In the case of a joint return under section 6013, this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse.

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26 U.S.C. § 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(Aug. 16, 1954, c. 736, 68A Stat. 851; Sept. 3, 1982, Pub.L. 97-248, Title III, § 329(a), 96 Stat. 618.)

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(2)

Supreme Court, U.S.
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No. 99-543

In the Supreme Court of the United States

JOHN R. LOUIS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause or the Excessive Fines Clause of the Constitution precludes the assessment of an addition to tax for civil fraud on an individual who previously has been convicted and sentenced for criminal tax offenses with respect to the same tax years.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 170 F.3d 1232. The memorandum opinion of the Tax Court (Pet. App. B1-B9) is unofficially reported at 71 T.C.M. (CCH) 3143.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1999. A petition for rehearing was denied on June 25, 1999 (Pet. App. C1). The petition for a writ of certiorari was filed on August 31, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner John R. Louis was the subject of a grand jury investigation based on information developed by the Criminal Investigation Division of the Internal Revenue Service (Pet. App. B2). In 1984, petitioner was indicted on two counts of criminal tax offenses with respect to his returns for 1977 and 1978 (*id.* at B3).[1] After a jury trial, petitioner was found guilty on both counts. He was sentenced to imprisonment for one year on the first count and three years on the second count, with the three-year sentence suspended contingent upon completion of a five-year probationary period. He was also fined $5000 on each count (*ibid.*). He served his prison term, completed his probationary period, and paid the criminal fines (*ibid.*).

2. On December 23, 1991, the Commissioner issued statutory notices of deficiency to petitioner for 1976, 1977 and 1978 (Pet. App. B2).[2] Based upon the items of omitted gross income that were also involved in the criminal prosecution, the Commissioner determined (i) that petitioner had underpaid his taxes by $1,448 for 1976, $14,340 for 1977, and $74,609 for 1978 and (ii) that

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[1] The documents attached to the Commissioner's Answer in the Tax Court show that petitioner was indicted and convicted of filing false returns, a violation of 26 U.S.C. 7206(1). See Tax Ct. No. 5942-92: CR 3: Answer (Exh. A: Indictment; Exh. B: Criminal Judgment); Tax Ct. No. 5943-92: CR 3: Answer (Exh. A: Indictment; Exh. B: Criminal Judgment). The parties nonetheless incorrectly stipulated that he was convicted under 26 U.S.C. 7201 (tax evasion). See C.A. E.R. 64-65. This error in the stipulation was pointed out in the government's brief in the court below. See C.A. Gov't Br. 3 n.2, 24-26.

[2] There is no statute of limitations on the assessment or collection of taxes with respect to a year for which the taxpayer has filed a fraudulent return. 26 U.S.C. 6501(c).

such underpayments were due to fraud (*id.* at B2-B3). Under the provisions of Section 6653(b) of the Internal Revenue Code then in effect, the Commissioner further determined that an addition to tax equal to fifty percent of the deficiency for each of these years was required. See 26 U.S.C. 6653(b) (1976). The resulting additions to tax were $724 for 1976, $7,170 for 1977, and $37,305 for 1978 (Pet. App. B2-B3).[3]

3. Petitioner filed petitions in Tax Court to contest the asserted deficiencies and additions to tax. He thereafter entered into a stipulation, however, in which he agreed that he would not contest his liability for the tax deficiencies and would contest his liability for the Section 6653(b) additions to tax only on constitutional grounds. Tax Ct. No. 5942-92: CR 24 (Stipulation of Settled Issues); Tax Ct. No. 5943-92: CR 27 (Stipulation of Settled Issues).

The Tax Court rejected the contention that the additions to tax were barred by either the Double Jeopardy Clause or the Excessive Fines Clause of the Constitution. The court concluded (Pet. App. B8) that the Double Jeopardy issue is controlled by *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), which held that additions to tax for fraud under the Internal Revenue Code are remedial, rather than punitive, and may therefore be imposed following a criminal prosecution without implicating the Double Jeopardy Clause. Because additions

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[3] The current counterpart to former Section 6653(b) is in Section 6663(a), which provides that, "[i]f any part of any underpayment of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud." 26 U.S.C. 6663(a). That Section is effective for all returns due after December 31, 1989. See Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7721(a), 103 Stat. 2395.

to tax are remedial rather than punitive, the Tax Court concluded that neither the Double Jeopardy Clause nor the Excessive Fines Clause is implicated in this case (Pet. App. B9).

4. The court of appeals affirmed (Pet. App. A1-A9). The court applied the two-step process described in *Hudson* v. *United States*, 522 U.S. 93 (1997), for determining whether a sanction is civil or criminal for Double Jeopardy Clause purposes: (i) looking first to whether Congress manifested a preference for one label or the other and (ii) then, if Congress intended to establish a civil penalty, evaluating whether the statutory scheme is nevertheless so punitive in purpose or effect as to transform the intended civil sanction into a criminal penalty (Pet. App. A3, citing *Hudson* v. *United States*, 522 U.S. at 99, and *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980)). With respect to the first step of this analysis, the court of appeals held that Congress plainly intended the addition to tax for fraud to be "a civil, not a criminal sanction" (Pet App. A4). Then, applying the "guideposts" set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), the court determined that the additions to tax imposed on petitioner were not so punitive as to transform what Congress intended to be a civil sanction into a criminal penalty.[4]

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[4] The "guideposts" described by the court of appeals were (Pet. App. A3-A4):

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7)

The court found it particularly significant that the addition to tax for fraud has not historically been regarded as punishment and that its purpose is remedial, for it serves "as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud" (Pet. App. A5, quoting *Helvering* v. *Mitchell*, 303 U.S. at 401). Although the court acknowledged that several of the "guidepost" factors were present to some degree, it found them insufficient to render the addition to tax criminal or punitive in nature. For example, the court stated that the third guidepost factor ("scienter") is present in that fraudulent intent is a prerequisite to imposition of the addition to tax. The court concluded, however, that the existence of that factor is of little significance because "punishing fraudulent intent is not the central focus of [the addition to tax]"; instead, "[t]he fraud requirement is designed to ensure that the additions are imposed only on taxpayers who engage in the type of deceptive behavior that is difficult and costly for the IRS to detect" (*ibid.*).

The court of appeals also determined that the imposition of the addition to tax for fraud following petitioner's sentencing for criminal tax evasion did not implicate the Excessive Fines Clause. The court noted that the purposes of the addition to tax for fraud are primarily remedial: to protect the revenue and to reimburse the government for the expense of investigating fraud (Pet. App. at A8). The court noted that—unlike the forfeiture provision that implicated the Excessive Fines Clause in *United States* v. *Bajakajian*, 524 U.S.

"whether it appears excessive in relation to the alternative purpose assigned."

321 (1998)—the addition to tax for fraud is not imposed as part of a criminal sentence and is imposed without regard to whether the taxpayer has been convicted of a felony (Pet. App. A8). The court concluded that, because the addition to tax for fraud is remedial rather than punitive, it is not barred by the Excessive Fines Clause (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The Fifth Amendment of the Constitution states that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." This Clause protects against "the imposition of multiple *criminal* punishments for the same offense" (*Hudson* v. *United States*, 522 U.S. at 99) and "serves the function of preventing both 'successive punishments and . . . successive prosecutions'" (*United States* v. *Ursery*, 518 U.S. 267, 273 (1996)). The court of appeals correctly held that the imposition of the addition to tax for fraud for petitioner's 1977 and 1978 tax years, after his conviction for criminal tax offenses for those years, did not expose him to unconstitutional double jeopardy.[5]

In *Helvering* v. *Mitchell*, 303 U.S. at 401-406, this Court concluded that the addition to tax for fraud is civil and remedial in nature and does not implicate the

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[5] In Tax Court, petitioner challenged the addition to tax for 1976 as well as those for 1977 and 1978. The addition to tax for 1976, however, raises no double-jeopardy issue because his criminal convictions involved only the years 1977 and 1978. See *United States* v. *Dixon*, 509 U.S. 688, 704 (1993); *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).

constitutional prohibition against double jeopardy.[6] The Court explained in *Mitchell* that civil tax sanctions are imposed primarily to protect the revenue and to reimburse the government for the expense of investigating and correcting the taxpayer's return. *Id.* at 401. The Court emphasized that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." *Id.* at 399. The Court held that additions to tax for fraud were "[o]bviously * * * intended by Congress as civil incidents of the assessment and collection of the income tax." *Id.* at 405.

This Court has repeatedly cited the decision in *Mitchell* with approval. See, *e.g.*, *Hudson* v. *United States*, 522 U.S. at 99, 103, 104; *Ursery*, 518 U.S. at 273, 289, 292; *Department of Revenue* v. *Kurth Ranch*, 511 U.S. 767, 779 n.16 (1994); *United States* v. *Ward*, 448 U.S. 242, 250 (1980); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 236 (1972); *Spies* v. *United States*, 317 U.S. 492, 495 (1943); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-549 (1943). Every appellate court that has considered the matter (both before and after the decision of this Court in the *Kurth Ranch* case) has followed *Mitchell* in concluding that the civil additions to tax for fraud do not constitute "punishment" within the scope of the Double Jeopardy Clause. See *I & O Publishing Co.* v. *Commissioner*,

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[6] The addition to tax involved in *Mitchell* stated that, "[i]f any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid." Revenue Act of 1928, ch. 852, § 293, 45 Stat. 791.

131 F.3d 1314, 1316 (9th Cir. 1997); *United States* v. *Alt*, 83 F.3d 779, 782 (6th Cir.), cert. denied, 519 U.S. 872 (1996); *Thomas* v. *Commissioner*, 62 F.3d 97, 100-102 (4th Cir. 1995); *McNichols* v. *Commissioner*, 13 F.3d 432, 435-436 (1st Cir. 1993), cert. denied, 512 U.S. 1219 (1994). See also *Bickham Lincoln-Mercury, Inc.* v. *United States*, 168 F.3d 790 (5th Cir. 1999) (civil sanction for failing to file forms reporting receipt of more than $10,000 in cash is not "punishment" within the scope of the Double Jeopardy Clause); *Ames* v. *Commissioner*, 112 T.C. 304 (1999) (same with respect to negligence penalty).[7] There is thus no conflict among the circuits nor other reason to warrant further review of the decision in this case.

b. Petitioner errs in contending (Pet. 12-13) that the decision of the court of appeals conflicts with *Department of Revenue* v. *Kurth Ranch*, *supra*, in which this Court held that a Montana tax on the possession of drugs constituted a criminal punishment within the

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[7] For the reasons described in detail in the decision of the court of appeals (Pet. App. A4-A7), the addition to tax for fraud satisfies the two-part test articulated by this Court in the *Hudson* and *Mendoza-Martinez* decisions. See pages 4-5, *supra*. Although, as petitioner notes (Pet. 10), the conduct to which the civil fraud statute applies would also generally constitute a crime, this Court has expressly held that fact is "insufficient to render the money penalties * * * criminally punitive." *Hudson* v. *United States*, 522 U.S. at 105. Accord, *Helvering* v. *Mitchell*, 303 U.S. at 399. Similarly, while *scienter* is a prerequisite to the imposition of the civil fraud additions, the existence of a *scienter* prerequisite to a civil sanction is not determinative of the double jeopardy issue. See, *e.g.*, *S.A. Healy Co.* v. *Occupational Safety & Health Review Comm'n*, 138 F.3d 686, 688 (7th Cir. 1998); *LaCrosse* v. *Commodity Futures Trading Comm'n*, 137 F.3d 925, 931, 932 (7th Cir. 1998); *SEC* v. *Palmisano*, 135 F.3d 860, 865-866 (2d Cir.), cert. denied, 119 S. Ct. 555 (1998).

constraints of the Double Jeopardy Clause. The state "tax" involved in the *Kurth Ranch* case was quite unusual: (i) it could be imposed only after an arrest for a drug offense; (ii) it was extremely high, amounting to 400 percent of the market value of the illegal drug; and (iii) it had no relation to the costs incurred by the State in investigating and prosecuting drug offenses. 511 U.S. at 784. Moreover, while the state tax in *Kurth Ranch* purported to be a property tax on the possession and storage of marijuana, it was not imposed until after the marijuana had been destroyed. None of these anomalous factors is present here. To the contrary, as other courts have emphasized in upholding the constitutionality of the addition to tax for fraud, "[t]he addition to tax imposed in this case is at the opposite end of the punitive/remedial spectrum from the tax levied in *Kurth Ranch*." *Thomas* v. *Commissioner*, 62 F.3d at 101-102.

c. Petitioner errs in contending (Pet. 6-7, 13) that *Helvering* v. *Mitchell*, *supra*, does not apply to this case. Petitioner asserts that *Mitchell* is inapplicable here because the taxpayer in that case had been acquitted, rather than convicted, of tax crimes before imposition of the addition to tax for fraud. This Court has long held that application of the Double Jeopardy Clause does not depend on the outcome of the first case: it applies whether the first case resulted in a conviction or in an acquittal. *Murphy* v. *United States*, 272 U.S. 630, 632 (1926). Indeed, in *Mitchell* itself the Court specifically held that the same principles apply under the Double Jeopardy Clause "whether the verdict [in the criminal case] *was an acquittal or a conviction*." 303 U.S. at 398 (emphasis added). As the court of appeals correctly stated in this case, "*Mitchell*'s conclusion that Congress intended additions to tax for

fraud to be a civil sanction is not limited to cases in which the taxpayer has previously been acquitted, rather than convicted, of criminal tax fraud" (Pet. App. A4).

Petitioner errs in contending that, in *Helvering* v. *Mitchell*, 303 U.S. at 397-398, this Court left open the question whether the Double Jeopardy Clause is implicated "where a conviction for tax fraud simultaneously determines a taxpayer's tax liability and § 6653(b) addition to tax for fraud for the same tax years" (Pet. 6-7). In *Mitchell*, the taxpayer had been acquitted of tax evasion and contended that his acquittal would, under the doctrine of *res judicata*, bar the Commissioner from seeking to impose the addition to tax for fraud. The Court rejected that contention because "[t]he difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*." 303 U.S. at 397. Having reached that conclusion, the Court stated that it was unnecessary to reach the government's alternative contention that the doctrine of *res judicata* was also inapplicable because of "the difference in the issues presented in the two cases." *Id.* at 398. The Court concluded that it was unnecessary to reach the question of the difference, if any, between "wilfully" (in the criminal statute) and "fraud" (in the civil statute) because the acquittal in the criminal case "is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based * * * ." *Id.* at 397.

2. a. The Eighth Amendment of the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Excessive Fines Clause "limits the government's power to extract payments, whether

in cash or in kind, as punishment for some offense." *United States* v. *Bajakajian*, 524 U.S. 321, 328 (1998) (internal quotation marks omitted). The court of appeals correctly held that the additions to tax involved in this case were remedial, rather than punitive, and that the Excessive Fines Clause is therefore not implicated in this case (Pet. App. A7-A9).

Petitioner errs in contending (Pet. 14-22) that this holding of the court of appeals conflicts with *Austin* v. *United States*, 509 U.S. 602 (1993). In *Austin*, the Court held that the determinative question under the Excessive Fines Clause "is not * * * whether [the challenged sanction] * * * is civil or criminal, but rather whether it is punishment." *Id.* at 610. The Court noted that the civil forfeiture statute involved in *Austin* had historically been viewed as punishment (*id.* at 618) and that the presence of a merely incidental remedial purpose in a forfeiture statute does not save such a punitive sanction from scrutiny under the Excessive Fines Clause. *Id.* at 610, 621-622.

The present case obviously differs from *Austin*, in which the Court concluded that the forfeiture sanction at issue in that case was sufficiently punitive to warrant scrutiny under the Eighth Amendment. The Court has long held that the addition to tax for fraud is remedial, rather than punitive, and that it functions as a safeguard for the protection of the revenue and to reimburse the government for the expense of investigating and redetermining the taxpayer's liability. *Helvering* v. *Mitchell*, 303 U.S. at 401. For that reason, the courts of appeals have consistently held, both before and after *Austin*, that civil additions to tax imposed under the Internal Revenue Code do not violate the Excessive Fines Clause. See, *e.g.*, *Little* v. *Commissioner*, 106 F.3d 1445, 1454-1455 (9th Cir. 1997);

United States v. *Alt*, 83 F.3d at 783; *Thomas* v. *Commissioner*, 62 F.3d at 100-102; *McNichols* v. *Commissioner*, 13 F.3d at 434.

b. Petitioner further errs in contending (Pet. 14-22) that the decision in this case conflicts with *United States* v. *Bajakajian*, *supra*. In *Bajakajian*, a traveler seeking to leave the country with $357,144 in cash was arrested for failing to comply with reporting requirements. In the criminal indictment, the government sought not only a conviction for violation of the reporting requirement but also a forfeiture of the entire $357,144. The relevant statute mandated the forfeiture of any property "involved in" the offense (18 U.S.C. 982(a)(1)). The lower courts concluded, however, that a forfeiture of the entire amount would violate the Excessive Fines Clause. 524 U.S. at 326-327.

This Court affirmed. The Court held that the forfeiture qualified as a "fine" within the meaning of the Excessive Fines Clause because it was imposed only as an additional sanction upon a person who has been convicted of a crime and thus represented "punishment for an offense." 524 U.S. at 328. In the present case, by contrast, the addition to tax is *not* "imposed at the culmination of a criminal proceeding" and does *not* "require[] conviction of an underlying felony" (*ibid.*). The addition to tax is assessed and collected as part of civil tax proceedings. It may be imposed without regard to whether the taxpayer has been convicted of a related tax offense. Indeed, as noted by the court below (Pet. App. A8), it may be imposed even when the taxpayer has been *acquitted* of a related criminal offense.

As this Court held in *Mitchell*, the addition to tax for civil fraud is a remedial measure designed to safeguard the revenue. 303 U.S. at 401. Unlike the forfeiture at issue in *Bajakajian*, the addition to tax is not "punish-

ment for an offense" (524 U.S. at 328) and therefore does not constitute a "fine" within the meaning of the Excessive Fines Clause.

Moreover, even if the addition to tax were thought of as a "fine," this civil sanction for the recovery of costs associated with investigating and redetermining the taxpayer's liability is not "excessive." A "fine" violates the Excessive Fines Clause only "if it is grossly disproportional to the gravity of a defendant's offense." *United States* v. *Bajakajian*, 524 U.S. at 334, 336. In *Bajakajian*, where "[t]here was no fraud on the United States, and respondent caused no loss to the public fisc" (*id.* at 339), the Court held that the criminal forfeiture of $337,144 was disproportionate to what was "solely a reporting offense" (*id.* at 337). The additions to tax involved in this case are set by Congress at one-half the amount that petitioner wrongfully withheld. That amount is designed to compensate the government for the significant costs incurred in investigating and redetermining petitioner's liability. The additions to tax resulting from petitioner's fraud are thus plainly not "grossly disproportional" to petitioner's acts. See *United States* v. *Alt*, 83 F.3d at 782-783 (additions to tax "not outrageous" in light of purpose to compensate government for the costs of investigation, detection, and recovery of lost money); *Thomas* v. *Commissioner*, 62 F.3d at 102 (civil fraud penalty not excessive).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1999